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265863—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

NOS. 410, 411

SIDNEY J. DILLON AND LEWIS E. CROWLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 313–320) is reported in 113 F. (2d) 334.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 16, 1940 (R. 320–321). A petition for rehearing (R. 325–340) was denied August 5, 1940 (R. 341). The petition for writs of certiorari was filed September 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated March 7, 1934.

QUESTIONS PRESENTED

The petition for a writ of certiorari presents 16 questions and numerous variations of those questions. In our view, however, the only real questions presented are:

1. Whether the sentences imposed on petitioners were void.

2. Whether the counts of the indictment to which petitioners entered pleas of *nolo contendere* sufficiently charged offenses.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix to the petition at pp. 90–91.

STATEMENT

On April 13, 1939, an indictment in twelve counts was returned against the petitioners in the District Court of the United States for the Southern District of Iowa (R. 1–18). The first count (R. 2–6) charged the petitioners with using the mails in furtherance of a scheme to defraud, in violation of Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338), and the twelfth count (R. 12–18) charged them with violating the fraud provisions of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77 (q)).

On July 3, 1939, petitioners entered pleas of not guilty to all counts of the indictment (R. 21). Pe-

titioner Dillon, on September 15, 1939, and petitioner Crowley, on September 29, 1939, withdrew their pleas of not guilty to counts one and twelve and entered pleas of *nolo contendere* to those counts (R. 21, 22). On the latter date the District Judge ordered that the cause as to each petitioner be passed for sentence until November 27, 1939 (R. 22). On the day set for sentencing, petitioners filed a motion for "Discharge and to Dismiss and Quash Indictment" (R. 23–25) and an amendment thereto (R. 25–26). The motion, with its amendment, was on that day overruled (R. 26–27) and the petitioners were orally sentenced (R. 241). On the same day the District Judge signed and there were filed in the District Court judgments sentencing the petitioners as follows: Dillon, a fine of $1,000 on count one and imprisonment for five years on counts one and twelve, the terms of imprisonment to run concurrently; Crowley, a fine of $1,000 on count one and imprisonment for three years on counts one and twelve, the terms of imprisonment to run concurrently (R. 164–167).[1]

[1] It was asserted, in effect, in affidavits executed by the petitioners and their counsel, which were filed in the Circuit Court of Appeals (R. 303–311), that these judgments were signed and filed after the conclusion of the term at which the oral sentences were pronounced and that the petitioners and their counsel were not present when the judgments were signed. As indicated, however, the record discloses that the judgments were signed and filed on the same day that the oral sentences were pronounced, November 27, 1939, and the judgments indicate on their

The Circuit Court of Appeals for the Eighth Circuit unanimously affirmed the judgments of conviction (R. 313–321).

ARGUMENT

In a petition of 79 pages[2] the petitioners have advanced numerous contentions which are patently frivolous. With the exception of one, all of the contentions of the petitioners which merit any consideration have been sufficiently answered in the opinion of the Circuit Court of Appeals.

With reference to the petitioners' contention that the signed judgments departed from the oral sentence in providing that the petitioners should be imprisoned until the fines imposed upon them were paid,[3] there is nothing in the record to indicate that this alleged variance was called to the attention of the District Court.[4] Petitioners are

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face that the petitioners and their counsel were present at the time the sentences therein specified were announced. The affidavits are obviously not a part of the record proper and no reference is made to them in the opinion of the Circuit Court of Appeals. The verity of the record cannot, we submit, be contradicted by affidavits which are extraneous to the record. *Johnson* v. *United States*, 225 U. S. 405, 411.

[2] Cf. paragraph 2 of Rule 38 of this Court.

[3] It should be noted that this contention, although urged in an assignment of error in the Circuit Court of Appeals (R. 274), was not discussed in the opinion of that court.

[4] While the judgments contained a statement that "Defendant excepts" (R. 165, 167), this was, of course, insufficient to call the court's attention to the point which petitioners now make.

not, however, remediless if the judgments are inaccurate. Their remedy is to seek by motion in the District Court to correct the judgments so as to make them speak the truth (*Hill* v. *Wampler,* 298 U. S. 460, 464). The passing of the term at which the judgments were rendered does not preclude the entertaining of such a motion (*Foster* v. *Zerbst,* 92 F. (2d) 950, 952 (C. C. A. 10th) and cases there cited).

CONCLUSION

The case was correctly decided by the Circuit Court of Appeals, there exists no conflict of decisions, and there is presented no important question of Federal law. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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